

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRIAN EDWARD DAVIS,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. H-16-1867
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	**Capital Litigant**
Correctional Institutions Division,	§	
Respondent.	§	

**RESPONDENT’S PARTIAL OPPOSITION TO PETITIONER’S
MOTION TO ALLOW FOR CASE BUDGETING
AND STAYING THE SCHEDULING ORDER**

On April 12, 2020, Petitioner filed a federal habeas petition raising twenty-seven claims. (Docket Entry [DE] 30).¹ The following day, the Court ordered the parties to submit a joint proposed scheduling order within ten days. (DE 31). Undersigned counsel for Respondent (the Director) drafted two proposed scheduling orders and emailed them to Davis’s counsel on April 13 and 14, 2020, but the parties were unable to reach an agreement. On April 22, 2020, Davis filed an “Opposed Motion to Allow for Case Budgeting and Staying Scheduling Order.” (DE 35). For the reasons that follow, the Court should deny Davis’s motion in part and adopt the proposed schedule submitted herein.

¹ Although Davis’s habeas petition ends with Claim 28, it skips Claim 24. (DE 30 at ECF page numbering 366-71).

As an initial matter, the Director does not generally oppose Davis submitting a CJA case budget. However, Davis asserts that preparing a budget may be complex dealing with matters “such as experts.” DE 35 at 1. The Director’s non-opposition should not be construed as agreeing that Davis is entitled to funding to develop evidence that was never presented in state court. This Court’s federal habeas review “is limited to the record that was before the state court” and “focuses on what a state court knew and did.” *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011).

Assuming *arguendo* it is appropriate for Davis to submit a budget above and beyond the one previously submitted in this case, Davis presents no reason why the federal habeas action should be held in limbo while he attends to these matters. As explained above, Davis has already filed his federal habeas petition (DE 30), although he did not submit a copy of the exhibits cited to in his petition. The Court ordered that “[t]he petition warrants a response at this time[.]” (DE 31 at 1-2). In anticipation thereof, on April 20, 2020, the Director filed a complete copy of the state-court record of Davis’s direct appeal (DE 32), direct appeal on retrial of punishment (DE 33), and state habeas litigation on nine writ applications (DE 35). At this juncture, it is entirely appropriate for the Court to issue a scheduling order such as that proposed by the Director:

- Davis shall file an Appendix of Exhibits containing a copy of all exhibits cited to his habeas corpus petition (DE 30) within 14 days of entry of the Court’s Scheduling Order.

- The Director shall file an answer or responsive pleading to Davis's federal habeas petition (DE 30) within 125 days of Davis filing his Appendix of Exhibits.
- Davis shall file a reply within 75 days of the Director filing her answer or responsive pleading.

CONCLUSION

For the foregoing reasons, the Court should grant in part Davis's motion for case budgeting but deny his motion to stay the scheduling order.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I further certify that on April 22, 2020, I electronically filed the foregoing response with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel for both parties.

/s/ Katherine D. Hayes

Katherine D. Hayes

Lead Counsel for Respondent